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No. 83-5878

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
Petitioners,

vs.

DRUG ENFORCEMENT ADMINISTRATION,
Respondent.

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SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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March 12, 1984

TABLE OF AUTHORITIES

Cases

Adkins v. DuPont Co., 355 U.S. 331 (1948)..... 3

Other Authorities

R. Stern & E. Gressman, Supreme Court Practice (5th ed. 1978)..... 2

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PETITIONERS' REPLY MEMORANDUM

Petitioners Alfred B. Shapiro and Gregory J. Wentz respectfully submit this reply memorandum in response to the memorandum of respondent Drug Enforcement Administration and in further support of their petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

1. The Solicitor General concedes that the issues upon which petitioners seek review are important questions of federal law, upon which there is a conflict among the circuits, and which clearly warrant review by this Court (Mem. 2). Indeed, as the Solicitor General notes (Mem. 2-3), approximately two weeks after the instant petition was docketed, the government filed its own petition for a writ of certiorari in United States Department of Justice v. Anthony Provenzano, No. 83-1045.[1/] As the Solicitor General

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1/ The government's petition for rehearing and suggestion for rehearing en banc in Provenzano were denied by the Third Circuit on November 10, 1983. The petition for a writ of certiorari in the instant case was docketed in this Court on December 8, 1983. The government's petition for a writ of certiorari in Provenzano was filed on December 23, 1983.

observes, "the questions presented in the two cases are identical" (Mem. 3 n.2).

2. After conceding that the issues presented by petitioners are worthy of review, and noting that the government has filed a petition raising "identical issues," the Solicitor General states: "Accordingly, we suggest that the Court should defer disposition of the instant petition pending its disposition of our petition in Provenzano" (Mem. 3; footnote omitted). The logic of the Solicitor General's suggestion is far from obvious. While asking that the Court give preference to the government's petition in Provenzano, the Solicitor General does not point to a single substantive or procedural difference between the two cases to suggest that Provenzano might be a better vehicle for Supreme Court review. Indeed, the Solicitor General's suggestion confounds common sense. One would assume that if only one of two petitions raising identical issues is to be granted, the petition to be granted would be the petition that was filed first. Cf. R. Stern & E. Gressman, Supreme Court Practice 297, 360-65 (5th ed. 1978).

3. Having failed to find any persuasive basis for distinguishing the two cases, despite having had 90 days in which to file a response to the petition in the instant case, the Solicitor General asserts in a footnote that "there is some question whether one of the petitioners [in the instant case] is entitled to proceed in forma pauperis" (Mem. 3 n. 2; emphasis added), and therefore suggests that "[a]ny uncertainty regarding Shapiro's right to proceed in forma pauperis should be clarified while the issue common to these cases is resolved in Provenzano" (ibid.). There is no merit to this suggestion.

First, the Solicitor General does not question the entitlement of Mr. Wentz to proceed in forma pauperis,

and the vindication of Mr. Wentz's substantive rights surely should not be delayed simply because the Solicitor General has raised a question concerning Mr. Shapiro's entitlement to so proceed.

Second, the suggestion with respect to Mr. Shapiro is ill-founded in any event. As Mr. Shapiro's affidavit shows, his total assets at the time the petition was filed consisted of a checking account balance of $314. It is manifest that Mr. Shapiro, who had only recently been released from custody, could not have paid for the printing of his petition, let alone the docketing fee.[2/]

The government's unrealistic and cramped analysis of Mr. Shapiro's affidavit is precisely the approach that the Court disapproved in Adkins v. DuPont Co., 355 U.S. 331 (1948), upon which the government purports to rely (Mem. 3 n. 2). Moreover, the government does not explain why it was necessary to take 90 days to raise this question, which is admittedly the only issue raised in its memorandum.[3/] Nor does the government suggest why it is now necessary for

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2/ The government asserts, however, that Mr. Shapiro should not be allowed to proceed in forma pauperis because he currently earns $1500 per month. To make this gross monthly income sound more substantial, the government assumes that Mr. Shapiro will continue to be employed at this amount, and thus states that Mr. Shapiro earns $18,000 per year. Even assuming Mr. Shapiro's continued employment and salary, the import of the government's argument is that Mr. Shapiro -- who is being represented by court-appointed counsel, has virtually no assets, and has two children to support -- should not be allowed to vindicate his rights unless he is willing to devote an amount equal to perhaps two or three months' gross income to the payment of the costs that would necessarily be incurred in the printing of briefs in this case. How Mr. Shapiro, with virtually no assets to begin with, is to accumulate that surplus in time to pay his printing bills is a question that remains unanswered in the government's footnote.

3/ Despite the fact that Mr. Shapiro's motion for leave to proceed in forma pauperis was filed more than three months ago, and counsel for petitioners has had several telephone conversations with government counsel since that time, the alleged issue of Mr. Shapiro's entitlement to proceed in forma pauperis had never been raised prior to the filing of the government's memorandum.

this Court to press forward with its consideration of Provenzano, while deferring action on the petition in the instant case. Only a month ago, when the Solicitor General asked the Court for an extension of time so that he could receive the brief in opposition in Provenzano prior to submitting his response to the instant petition (thus reversing the natural chronology of the two cases), he supported his request by noting that the instant case "would not be scheduled for argument this Term in any event" (Letter of February 3, 1984). The same is now true of Provenzano. One must conclude from these facts that the raising of this issue at this time is merely an attempt to gain some perceived tactical advantage.

4. Since the government has raised no question concerning Mr. Wentz's motion for leave to proceed in forma pauperis, that motion should be allowed and the petition for a writ of certiorari should be granted. In addition, the government has raised no question of substance concerning Mr. Shapiro's motion, which should also be allowed.

It is respectfully submitted that the petition for a writ of certiorari should be granted and the case set down for oral argument.

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Dated: March 12, 1984